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No. 85-1283

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1985

MARY HAYSSEN, ALLAN B. GOLDSMITH, JEANIE A. GOLDSMITH, HARVEY ZOET, BARBARA LARSON, ROBERT L. LARSON, and EDWARD HARTNETT,

Petitioners,

vs.

BOARD OF ZONING ADJUSTMENTS OF THE COUNTY OF SONOMA,

Respondent.

LOREN M. BERRY,

Real Party in Interest.

REPLY TO OPPOSITION

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I.

THIS CASE PRESENTS ISSUES OF GENERAL PUBLIC IMPORTANCE.

The Opposition to Petition for Writ of Certiorari brief filed by the County of Sonoma urges that neither Mullane nor its progeny establish a personal notice

requirement when fundamental property rights are adjudicated. The New York and California cases cited by respondent suggest the national dimensions of the issue. Petitioners submit that respondent's constitutional approach will persist until it is dealt with by this Court.

Recent California legislation cited by real party in interest does not resolve the broad issues of this case. Had the legislation been in effect, it would not have guaranteed either better notice or rights of enforcement.

The California legislation, by creating a statutory hybrid of personal and impersonal notice rights, eclipses the rights of many of those who have a fundamental stake in the outcome of the use permit hearing. The arbitrary 300 foot limit applies to all uses--including toxic waste sites, nuclear power plants, sawmills and dumps--irrespective of actual impact. Government Code § 65091 thus would not have

produced adequate notice in this case. The BZA authorization at 400 feet produces speech interference with up to an eightfold increase in noise levels (R.T. 204:5-205:23; 208:17-209:3; J.A. 529-536). The Goldsmith and Zoet properties, over 500 feet away from the sawmill, experience a doubling of ambient noise levels (R.T. 257-259:17). The Larson house, over 300 feet from the sawmill property and over 1,000 feet from the sawmill, suffers a quadrupling of ambient noise levels (R.T. 262:13-263:5).

Government Code § 65091(3) imposes no personal notice requirement at all when large numbers of people are affected. Thus, the owners of immediately adjoining properties who suffer drastic impacts also suffer the risk of receiving "notice" in an unsubscribed newspaper. In California such "notice" is

frequently placed in legal newspapers not read by the general public.[1/]

Government Code § 65091 thus violates the basic tenet that the right to due process is "individual." Boddie v. Connecticut, 401 U.S. 371, 380 (1971). The legislation likewise ignores the rule that the "extent to which procedural due process must be afforded . . . depends on the extent to which [the person affected] may be 'condemned to suffer a grievous loss.'" Goldberg v. Kelly, 397 U.S. 254, 262-263 (1970).

The enforcement provisions of the California legislation further emasculate the law. Companion sections of the Government Code create a myriad of hurdles for anyone seeking

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1/ The notice period creates an additional problem. The mailing of notice 10 days prior to the hearing may result in actual notice of a week or less. Such short notice is hardly adequate in a complex case where important property rights may be lost. The use permit applicant has had months to prepare.

to enforce their right to notice. The failure to receive a notice is not a ground for invalidating a use permit hearing. Government Code §65093.[2/] One asserting a lack of notice or a defective notice bears the burden of proving (1) substantial injury to himself or herself; (2) prejudicial error; and (3) "that a different result would have been probable if the error had not occurred." Government Code § 65010(b).[3/]

2/ Government Code § 65093 provides:

> "The failure of any person or entity to receive notice given pursuant to this title, or pursuant to the procedures established by a chartered city, shall not constitute grounds for any court to invalidate the actions of a local agency for which the notice was given."

3/ Government Code § 65010(b) provides:

> "(b) no action, inaction, or recommendation by any public agency or its legislative body or any of its administrative agencies or officials on any matter subject to this title shall be held invalid or set aside by any court on the ground of the improper admission (cont.)

Thus, in the case below, the California Court of Appeal looked past the County's misleading notice on the grounds that petitioners also had not seen it. This same logic would seem to require that, in a large project requiring only a newspaper ad, out-of-County landowners would have no rights whatsoever since they could not be expected to see an ad. Absent the requirements of due process, the possibility of post-adjudication relief might also bar all rights of enforcement.

3/ (continued)

> or rejection of evidence or by reason of any error, irregularity, informality, neglect, or omission (hereafter, error) as to any matter pertaining to petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals, or any matters of procedure subject to this title, unless the court finds that the error was prejudicial and that the party complaining or appealing suffered substantial injury from that error and that a different result would have been probable if the error had not occurred. There shall be no presumption that error is prejudicial or that injury was done if the error is shown."

Finally, the burden of proving "a different result would have been probable" can close the door on a case before it is heard.

California's Government Code § 65091 is no substitute for due process and need not be considered by this Court. California's synthetic solution, if anything, makes all the more pressing the need to identify the fundamental individual and personal rights which lie at the heart of the Due Process Clause.

II.

THE NEED FOR JUDICIAL RELIEF IS REAL.

The Opposition brief filed by real party in interest contends that this case is moot. This is an extraordinary claim. At seven in the morning the roar of a sawmill swallows the quiet of petitioners' properties. Thirty-fold increases of noise levels are legally inflicted upon the Hayssen property until seven

at night. Noise levels in other properties have quadrupled or doubled.

Given a violation of due process and 42 U.S.C. § 1983, the right to relief cannot be questioned. "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Bell v. Hood, 327 U.S. 684 (1946).

A. Declaratory Relief.

Petitioners own properties in California and other states. They seek a clear pronouncement of the personal notice requirement.

B. Injunctive Relief.

Petitioners say that the wrong done in this case cannot necessarily be undone because, even if a revocation is granted, the County's decision-making processes may be weighted in favor of a new application now that the sawmill has been constructed.

Noise limits can still be judicially imposed. State of the art noise insulation can be required. The location of certain equipment can be moved. Hours of operation can be limited.

C. A Supplemental Pleading Is Not Required.

Monetary relief may be awarded in a Section 1983 action for equitable redress when the court is otherwise unable to grant full relief. Owen v. Independence, 560 F.2d 925 (8th Cir. 1977), vacated on other grounds, 438 U.S. 902; Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980). See also Snelson v. Ondulando, 5 Cal.App.3d 243, 259 (1970).

The right to file a supplemental complaint to state post-trial facts, upon remand, cannot be seriously questioned. See Texarkana v. Arkansas Louisiana Gas Co., 306 U.S. 188, 203 (1939). This procedure is proper in cases arising out of an injunction against a threatened harm. See, e.g., Melvin v. Stone

Co., 7 Cal.App. 324 (1908) (original complaint for injunction against threatened blasting and excavating; supplemental complaint for damages for injury to house resulting therefrom). Davis v. Stroud, 52 Cal.App.2d 308, 315 (1942). The right to plead such facts is so basic that California does not require a supplemental pleading. Thus California's leading authority states:

> "Where a suit is brought for an injunction, and a cause of action for incidental damages accrues pending the action, a supplemental complaint is proper (see infra, §1169). But the court under its general equity powers may award the incidental damages without the necessity of the supplemental pleading. (Union Oil Co. v. Reconstruction Oil Co. (1937) 20 C.A.2d 170, 183, 66 P.2d 1215; (1943) 58 C.A.2d 30, 33, 135 P.2d 621; Hutcherson v. Alexander (1968) 264 C.A.2d 126, 136, 70 C.R. 366.)" (Emphasis in original.)
> 3 Witkin, California Procedure 3d, §1166.

D. Damages.

Petitioners' ultimate right to damages cannot be questioned. Agins v. City of Tiburon, 24 Cal.3d 266 (1979), a case whose authority

is itself subject to question, is not controlling. Both the law of this Court and the law of California recognize the right to seek damages for a government imposed noise easement. See, e.g., Griggs v. Allegheny County, 369 U.S. 84 (1962); Greater Westchester Homeowners Ass'n v. City of Los Angeles, 2 Cal.3d 86, 95 (1974), cert. den. 419 U.S. 1122 (1975). This liability arises even where, as in this case, the public entity lacks the power of eminent domain. Baker v. Burbank-Glendale-Pasadena Airport Authority, 39 Cal.3d 862, 866 (1985).

This case thus involves damages which extend beyond those arising from a government imposed noise easement. The County of Sonoma gave what it could not give: the rights of one citizen to another. Damages may be recovered for the breach of procedural due process which brought about this unconstitutional result. Myers v. Anderson, 238 U.S. 368 (1915); Hostrap v. Board of Junior College

Dist. No. 15, 523 F.2d 569 (7th Cir. 1975), cert. den., 425 U.S. 963; Busche v. Burkee, 649 F.2d 509 (7th Cir. 1981), cert. den., 70 L.Ed.2d 212.

CONCLUSION

The reach of the personal notice requirement is an issue of broad importance. Petitioners respectfully request that the Writ of Certiorari be granted.

Dated: May 9, 1986.

Respectfully submitted,

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